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Chairman: Mr. YAMADA (Japan)

(Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses)

CONTENTS

AGENDA ITEM 144: CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (continued)

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Mr. Yamada (Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses) took the Chair.

The meeting was called to order at 3 p.m.

AGENDA ITEM 144: CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (continued)

Elaboration of a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission in the light of relevant comments and observations of States and views expressed in the debate at the forty-ninth session (continued) (A/51/275 and Corr.1 and Add.1; A/C.6/51/NUW/L.1)

1. The CHAIRMAN invited the Working Group of the Whole to continue its consideration of the draft articles on the law of the non-navigational uses of international watercourses, and of the comments thereon.

Article 3

2. Mr. de SILVA (Sri Lanka) said that, with regard to the meaning of the term "framework convention" and the legal consequences of its utilization, the International Law Commission appeared to have preferred not to clarify the term and to allow the parties to the future convention the possibility of considering that it did not affect existing agreements. All the proposals formulated in that regard must be studied carefully, and it was perhaps not possible to settle the question immediately.

3. With regard to the role of the Expert Consultant in the work of the Working Group, his delegation considered that it was sometimes useful to know how the Commission had arrived at the text it had adopted, and that the Expert Consultant was well qualified to provide explanations in that regard. One might wonder why, for instance, in article 1, paragraph 1, the Commission had not referred to measures "of protection", as, in his delegation's view, would have been desirable. It was perhaps because the Commission had considered that that notion was implied in the notion of "conservation". In any case, the members of the Working Group must be allowed the chance to request the Expert Consultant's opinion.

4. Mr. LAVALLE (Guatemala) concurred with the comments made by the representative of Sri Lanka concerning the role of the Expert Consultant.

5. Referring to the proposal made by France at the previous meeting regarding the type of instrument envisaged - namely, a framework convention - he said that when a treaty entered into force, the obligations it set forth must be implemented immediately by the parties, the sole exception being when conditions suspensive provided for the suspension of implementation after entry into force for exceptional reasons. It was thus doubtful whether implementation of the framework convention envisaged could be made subject to suspensive provisions

contained in other instruments; the conditions suspensive and the arrangements for their application would have to be expressly defined therein.

6. Furthermore, while it was true that the provisions of a framework convention were of a general character and very broad in their scope, the same was true of most treaties; which did not, however, permit the invoking of conditions suspensive not expressly defined in the instruments in question. In the present case, the riparian States of an international watercourse could decide among themselves not to apply part or all of the convention, and such a possibility was expressly provided for in the Vienna Convention on the Law of Treaties. It also bore noting that the provisions of some multilateral treaties applied only to relations between certain parties to those treaties: thus, the Vienna Convention on Consular Relations applied only to States that had reciprocal consular relations. Lastly, the riparian States of an international watercourse constituted a community with its own specific characteristics, and the communities constituted by the riparian States of the various international watercourses were often very different from one another and could thus not be governed by the same provisions. For that reason, the riparian States of an international watercourse must be able to conclude the requisite arrangements in the light of the characteristics and uses of that watercourse.

7. Mr. NGUYEN DUY CHIEN (Viet Nam) said that the importance of existing agreements vis-à-vis the future convention should not be overestimated, since the latter dealt with different issues, namely, the non-navigational uses of watercourses. In his view, article 3 correctly defined the relationship between the proposed framework convention and future agreements on watercourses, and there was no need to delete or amend paragraph 3. On the other hand, a provision concerning the relationship between the convention and existing agreements needed to be added to the draft articles; that provision should figure at the end of the convention, before the provisions relating to signature and entry into force, and not, as some delegations had proposed, in article 1, which dealt with the entirely different question of which uses of international watercourses fell within the scope of the framework convention.

8. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that he considered the text of article 1, as amended by Finland and Argentina with regard to its first subparagraph, to be acceptable. He also favoured the amended wording of article 3 proposed by Portugal in its written observations. The future instrument should certainly be a framework convention, but that was no reason not to give it some substance: it must set forth principles of which States would have to take account when negotiating future watercourse agreements while still having the possibility of adapting them to the characteristics and uses of the particular watercourse, as provided in article 3.

9. Mr. CHAR (India) said that the text of article 3 was sufficiently clear with regard to the nature and scope of the framework convention. The convention would not limit the freedom of the parties to continue to apply existing agreements or to amend them to take account of their joint needs. Nevertheless, in the light of the debate, his delegation endorsed the proposals made by France and Switzerland and intended to support them.

10. Mr. LOIBL (Austria) concurred with those delegations that had proposed adding a saving clause concerning existing agreements, and considered that the proposals submitted by Switzerland and the United States in that regard merited more detailed consideration. Furthermore, article 3 should perhaps also cover the case of regional agreements not confined to a specific watercourse.

11. Mr. ESCARAMEIA (Portugal) said that in the comments and observations it had submitted (A/51/275), Portugal proposed two amendments to article 3. First, at the end of paragraph 2, the following sentence would be added: "Such agreement shall, when the need arises, take into consideration an environmental impact assessment." That addition seemed necessary not only because the objective of the negotiations must include environmental considerations, but also because environmental impact studies constituted an important aspect of what might be called the procedural rules of international environment law. However, the words "when the need arises" introduced some flexibility, and should make the amendment acceptable. Similarly, Portugal proposed adding the following phrase to the end of article 3, paragraph 3: "in accordance with the principles of international environment law aiming at an enhanced protection of the watercourse and its ecosystems".

12. With regard to the status of the framework convention, Portugal, like Italy, considered that it could not be applied retroactively so as to affect existing agreements. Given that those agreements might sometimes lend themselves to differing interpretations, it would perhaps be necessary to include in the framework convention a provision similar to the one concerning existing agreements contained in article 9 of the Convention on the protection and use of transboundary watercourses and international lakes, for instance, by providing that States parties to those agreements must endeavour to adapt them so as to eliminate therefrom any provision contrary to the fundamental principles of the framework convention. As for future agreements, the framework convention was bound to have some influence on their elaboration.

13. Mr. VORSTER (South Africa), recalling that the delegations of Zambia and Mozambique had referred to the measures taken by the member States of the Southern African Development Community (SADC) to cooperate in regulating the use of the watercourses of southern Africa, said that South Africa had signed the protocol on joint uses, which contained certain provisions also found in the Commission's draft articles on international watercourses.

14. With regard to article 3, it should be stated clearly in that article that existing agreements would not be affected by the future convention. The freedom of the riparian States of an international watercourse to regulate the uses of that watercourse having regard to its characteristics must not be unduly hampered, but the wording of article 3, paragraph 1, seemed to mean that when they concluded agreements for that purpose, States could only apply and adjust the provisions of the future framework convention. Yet the Commission had indicated in paragraph (4) of its commentary that the verbs "apply and adjust" meant that, while the agreements relating to the various international watercourses must take due account of the provisions of the draft articles, the latter were essentially residual in character. The text of paragraph 1 should therefore be amended so as to make that quite clear.

15. South Africa also believed that the proviso to be found at the end of article 3, paragraph 2, was too broad. Its wording did not take account of the fact that the State whose interests were likely to be affected might, for various reasons, consent thereto. That proviso should accordingly be limited to the harmful effects to which the affected State had not consented. Lastly, the same paragraph envisaged the conclusion of agreements with respect to "a particular project, programme or use". That wording was too restrictive and South Africa proposed that it should be replaced with the words "a particular programme or project with regard to its use, management, protection or preservation".

16. Mr. ISKIT (Turkey) said that the parties to existing agreements must be free to choose whether or not to accept the principles set forth in the draft articles. If they decided to amend or adjust them in order to take account of those principles, all the riparian States of the watercourse must agree to do so. As for future agreements, there again the parties must be free to conclude both agreements that took account of the framework convention's provisions and agreements that diverged therefrom, even to a substantial extent. The framework convention should not be applicable automatically, but only when agreements concluded by all the riparian States of a particular watercourse gave effect to its provisions. Turkey's position in that regard was thus close to that of France and Switzerland. Lastly, in view of the general character of article 3, Turkey considered that the amendments proposed by Portugal should be considered in the context of part IV, which dealt expressly with environmental questions.

17. Mr. GABEL (Israel) said that the convention did not affect existing agreements. As for future agreements, States had full freedom in that regard, provided those agreements did not adversely affect other States. Only when another State was affected by those agreements would the provisions of the framework convention be applied.

18. Mr. ŠMEJKAL (Czech Republic) said that existing agreements must not be affected by the future convention, and that the proposals submitted by Switzerland and France in that regard were a step in the right direction, and also had the virtue of covering the interpretation of those agreements. Difficulties remained, however, particularly with regard to the question, raised by the United States delegation, of the points on which the existing agreements were silent, and the extent to which future agreements could diverge from the principles set forth in the convention.

19. A proposal that might resolve those difficulties had been submitted at the previous meeting. That proposal was to state in article 3 that the framework convention, by virtue of its nature and general scope, could not be automatically applicable and that implementing agreements were necessary to give effect to those provisions. It would be premature to dismiss that proposal on the grounds that it would be tantamount to transforming the framework convention into a series of model rules and that it would run counter to the mandate given by the General Assembly. On the contrary, it had two advantages. First, it took account of the fact that the provisions of the future convention were so general in scope and nature that it was difficult to envisage them being applied directly. Secondly, the conclusion of special agreements would enhance international cooperation in the area under consideration. In the absence of

such agreements, the application of the general principles set forth in the framework convention to particular situations might give rise to disputes that would be difficult to resolve. For that reason, his delegation hoped that further consideration would be given to that proposal.

20. Mr. PRANDLER (Hungary) said that his delegation supported the proposal submitted by Finland in its written observations; further thought should be given to the question whether article 3 should encourage, or indeed oblige, States parties to conclude more specific agreements on certain aspects of the uses of international watercourses. He also concurred with the very specific Portuguese proposals concerning paragraphs 2 and 3 of article 3: the agreement or agreements must indeed be concluded in accordance with the principles of international environment law. As for the Venezuelan proposal, it was justified in the light of the fact that, since circumstances could change considerably, it might be necessary to adjust the existing treaties or to conclude new treaties.

21. Mr. ELMUFTI (Sudan) said that, with regard to the relationship between the draft articles and existing agreements, his delegation supported the proposal that a provision should be added to article 3 stipulating that in the event of a conflict between existing agreements and the proposed regime, efforts should be made to bring those agreements into line with the new regime. To lend further weight to the arguments put forward by other delegations in support of that proposal, his delegation noted that article 4, paragraph 1, which entitled every watercourse State to participate in the negotiation of any agreement that applied to the entire watercourse, and article 10, paragraph 1, which provided that no use of a watercourse enjoyed inherent priority over other uses, confirmed the need to include the proposed provision in article 3.

22. Mrs. FERNÁNDEZ de GURMENDI (Argentina) said that the framework convention must not in any way affect existing agreements, and that a paragraph to that effect should be added to article 3. Consideration should also be given to the proposal made that morning by the United States delegation, to the effect that the framework convention might fill the gaps in those agreements. Account should also be taken of their intentional silences on certain matters.

23. With regard to article 3, paragraph 2, her delegation wished to propose a drafting amendment to the Spanish version of the phrase "provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse." The term "menoscabe" was not appropriate. It would be better to bring the text into line with the wording of article 7.

24. Mr. MAZILU (Romania) supported the Venezuelan proposal concerning article 3. He proposed that a fourth paragraph should be added, reading: "This Convention shall not alter the rights and obligations of the watercourse States arising under other agreements in force on the date on which they become Parties to the Framework Convention." On the question of the relationship between the framework convention and future agreements, he concurred with the statements made by the representatives of the United States and Argentina.

25. Mr. NEGA (Ethiopia) said he was opposed to including in the framework convention a provision expressly excluding existing agreements from its scope,

because agreements existed that ran counter to the principles embodied in the convention, in particular that of equitable and reasonable utilization. The principles in the convention, which reflected the progressive development of the law in that area, would be rendered meaningless by a provision entirely excluding existing agreements from its scope. He had listened carefully to the objections raised by some Member States, including France, but believed that their concerns were implicitly taken into account in articles 1 and 3. Therefore, a provision addressing the relationship between the future convention and existing agreements was unnecessary. In any case, his delegation felt that the question should be examined at the end of the Working Group's meetings on the basis of the proposals submitted at the preceding meeting, especially the proposal of Italy.

26. Mr. de VILLENEUVE (Netherlands) said he agreed with the representative of Ethiopia and felt that the consideration of those sensitive questions should be postponed until the end of the Working Group's meetings. The proposal of Italy concerning existing agreements deserved careful consideration. As far as future agreements were concerned, the text of article 3 was rather vague. When one or more watercourse States wished to conclude an agreement, the other watercourse States must be required to accede to it if requested to do so. Paragraph 1 should therefore be amended to read: 'Watercourse States shall, at the request of one or more watercourse States, enter into one or more agreements'. Of course, the agreement or agreements must have been negotiated in good faith. In addition, the word "adjust" caused problems, but it would be preferable to return to that matter once the consideration of general questions had been concluded.

27. Mr. AL-ADHAMI (Iraq) said that many States attached great importance to the draft convention and hoped that it would lead to practical solutions for the problems posed by the utilization of international watercourses. Although it was a framework convention, it was important that it should define precise criteria. His delegation approved of the text of article 3 as a whole, but would prefer more specific wording for paragraph 2.

28. Ms. GAO Yanping (China) said that article 3 concerned not only the scope of the convention, but also the rights of watercourse States. She supported the emerging consensus on the direct links between articles 1 and 3. Article 3 was reasonable and well balanced, and she agreed with the Commission's commentary to that article, which stated that, in the absence of agreements between watercourse States, the convention would serve as a basis for future agreements. The framework convention could not, however, modify the tenor of existing agreements, for two reasons. First, existing agreements fell within the scope of the competence and the sovereign rights of watercourse States. Second, the framework convention could not resolve all the questions concerning the non-navigational uses of watercourses. States should therefore be free to conclude the agreements which suited them. As for the Portuguese proposal to add to paragraphs 2 and 3 a clause concerning environmental protection, the proposed text did not belong in article 3, which dealt with future agreements and on the relationship between them and the framework convention.

29. Mrs. DASKALOPOULOU-LIVADA (Greece) said that, on the whole, the current wording of article 3 was satisfactory because it preserved the ability of States

to conclude new agreements in that area, while specifying that they were also under an obligation not to adversely affect the use of watercourses by other riparian States. However, there was certainly room for improvement in both substance and form. Thus, it should be indicated more clearly that the parties could decide by mutual agreement to adapt existing agreements to remove possible contradictions with the framework convention. As the representative of Portugal had suggested, the corresponding provision of the Convention on the Use and Protection of International Watercourses and Lakes could serve as a model in that regard.

30. Mrs. FLORES (Mexico) said that draft article 3 was satisfactory, in particular because it provided for the possibility of adapting the provisions of the framework convention to the characteristics and uses of a particular international watercourse. The relationship between the framework convention and existing agreements must, however, be made more specific. In that regard, Mexico welcomed the proposals of Romania and the United States with regard to article 1. As for future agreements, the parties should be guided by the principles embodied in the convention and should not be entitled to depart significantly from its provisions.

31. Mr. TOMKA (Slovakia) said that the relationship between the framework convention and existing agreements should be governed by the principle that lex specialis took precedence over lex generalis. For that reason, Slovakia supported the proposal, submitted by Switzerland in its written observations (A/51/275), that a clause expressly safeguarding existing watercourse agreements should be inserted in the draft convention. At any rate, even if States concluded agreements that contradicted certain obligations they had undertaken elsewhere, those agreements remained valid, insofar as they did not contravene any mandatory rule of international law.

32. Moreover, without underestimating the importance of the evolution of international environmental law, Slovakia did not believe that an environmental impact assessment would always be justified in the case of bilateral or multilateral agreements concerning the utilization of an international watercourse; everything would depend on the activities covered by that agreement. Moreover, who would decide when such an assessment was necessary? For that reason, his delegation did not support the Portuguese proposal.

33. Mr. NUSSBAUM (Canada) agreed that the text should be amended in order to clarify the relationship between the future framework convention and existing and future agreements. He proposed that the Drafting Committee should settle the question, on the basis of the proposals contained in document A/51/275, and decide whether the clarifications should be included in article 1 or article 3.

34. The CHAIRMAN suggested that the Working Group should proceed to its consideration of draft article 4.

35. Mr. LALLIOT (France), supported by Mr. BRODARD (Observer for Switzerland), Mr. ISKIT (Turkey) and Mr. ROGACHEV (Russian Federation), emphasized that the question of the relationship between the framework convention and existing or future agreements must be settled before the Working Group proceeded to consider subsequent articles. Agreement must be reached on the general principle of the

legal scope and non-retroactivity of the convention. Since that was a substantive issue which would determine the future course of the Working Group's work, it should not be referred to the Drafting Committee.

36. The CHAIRMAN said that, because so many questions had been raised, it would be impossible to draw conclusions immediately. Delegations must first submit specific proposals and consult among themselves to coordinate their positions. He again suggested that, in order to save time, the Working Group should begin its consideration of article 4.

37. Mr. CALERO RODRIGUES (Brazil), supported by Mr. HARRIS (United States of America), said that the Chairman's proposal was acceptable. He proposed that the problems raised by draft articles 1 and 3 should be resolved at the meeting to be held on the following day.

38. Mr. BRODARD (Observer for Switzerland) said that article 4, paragraph 1, by which each watercourse State was entitled to participate in the negotiation of and to become a party to any watercourse agreement that applied to the entire watercourse, even if it had not taken part in its formulation, was acceptable to his delegation.

39. Paragraph 2 of the article was somewhat different. Under that provision a third State forming part of a watercourse could claim entitlement to participate in the negotiation of an agreement and to become party thereto, even if the instrument did not relate to its part of the watercourse, provided only that its use of a watercourse "may be affected to a significant extent" by implementation of the agreement. While such a solution was conceivable from the standpoint of the law of treaties, it might deprive watercourse States of their contractual freedom, except where they acted in the framework of the members of the watercourse community as a whole. Thus, any initiative taken by any riparian State, indeed by all such States other than one, might be blocked ad infinitum by a single country, and, in the absence of any compulsory dispute settlement machinery, on the basis of its subjective appreciation of the risk inherent in the scheme.

40. Switzerland would therefore have great difficulty in accepting that solution, which not only involved excessive restrictions on the contractual freedom of States, but also created inequalities between them. Accordingly, his delegation was of the view that the matter covered in article 4, paragraph 2, should be dealt with in the context of part III (Planned measures) of the draft articles: what was valid for measures planned by one watercourse State must be equally valid for initiatives taken by several States.

41. Mr. de SILVA (Sri Lanka) said that the Swiss delegation had raised an interesting point; it would be useful to have that proposal in writing. On a related issue, he wondered whether, should the entitlement conferred on third States by article 4 not be exercised, it could be exercised subsequently or whether it would lapse; a State should not be able to prevent other watercourse States from concluding the agreement in question or from implementing it.

42. Mr. PRANDLER (Hungary) recalled that the Swiss Government had set forth its position in its written observations, contained in document A/51/275. He read

out the last three sentences of those observations, and indicated that Hungary could not support that line of argument. It amounted to exclusion from consultations and perhaps from negotiations of a watercourse State whose use might be affected. The current wording of article 4, paragraph 2, with the formulations "to a significant extent" and "to the extent that its use is thereby affected" was balanced, in that it protected both States wishing to implement projects and programmes as well as third States. Hungary could thus not accept the Swiss proposal to delete article 4, paragraph 2.

43. Mr. ROSENSTOCK (Expert Consultant) said that it seemed to him that by and large inadequate account was being taken of the commentary to article 4 and to other articles. Paragraph 5 of the commentary to article 4 read:

> "The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a set of draft articles that are to provide general principles for the guidance of States in concluding agreements on the use of fresh water should ensure that State C has the opportunity to join in consultations and negotiations, as a prospective party, with regard to proposed action by States A and B that would substantially reduce the amount of water that flowed through State C's territory."

44. Account must also be taken of articles 11, 12 et seq.: where measures were envisaged which might have a significant impact on the use of a watercourse by other States, specific obligations concerning notification and consultation were provided for. No element in article 4, paragraph 2, gave a right of veto to third States. Rather, articles 11, 12 et seq. set forth very extensive notification and consultation obligations. It would be interesting to hear from those delegations which deemed those obligations insufficient to meet the needs which were supposed to be met by article 4, paragraph 2, and to know exactly what the lacunae were.

45. Mrs. FERNÁNDEZ DE GURMENDI (Argentina) said that it was not necessary to delete article 4, paragraph 2, even if, as currently worded, it appeared to give an excessive entitlement to third States and to lend itself to extreme interpretations by such States. It was essentially a drafting issue.

46. Mr. NGUYEN DUY CHIEN (Viet Nam) supported the comments by the Hungarian delegation. Given the nature and object of the Convention, it was important for the interests of all riparian States of an international watercourse to be protected, since most of the time activities in one part of the watercourse would affect other parts. The wording retained by the International Law Commission was satisfactory and did not in any way give too much power to third States.

47. Mr. TOMKA (Slovakia) said that the Commission had perhaps gone too far, in that article 4, paragraph 2, created the impression that the third State had an entitlement to participate actively in the negotiation of the agreement in question. Perhaps the words "and in the negotiation of", in the penultimate line of the paragraph, could be deleted, with the third State retaining an entitlement to participate in the consultations.

48. Mrs. DASKALOPOULOU-LIVADA (Greece) said that her delegation supported the current wording and endorsed the comments made by Sri Lanka, Hungary and Viet Nam regarding the Swiss position on article 4. If that position were well founded, paragraph 1 should also be deleted. The explanations given by the Expert Consultant in that regard should dispel the fears of the Swiss delegation.

49. Mr. LALLIOT (France) said that France reserved its position on article 4 until agreement had been reached on the principle, and not merely on the form, of article 3 and of article 1, if necessary. The discussion, interesting as it was, which had just taken place on the Swiss initiative demonstrated that interpretation of article 4 and of the following articles was closely linked to the interpretation to be given to article 3, namely the scope to be given to the framework convention.

50. The CHAIRMAN said that he had asked Mr. Calero Rodrigues, who had accepted, to help him in his personal capacity to coordinate consultations among the various delegations which had submitted proposals so as to reach agreement on articles 1 and 3. At the following meeting the Working Group of the Whole should, taking into account the outcome of those consultations, be in a position to express a view on those articles before continuing with consideration of articles 4 et seq.

The meeting rose at 5.30 p.m.